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C.W., Appellant)	
)	
and)	Docket No. 20-1339
)	Issued: September 15, 2021
U.S. POSTAL SERVICE, WAKEFIELD)	
STATION POST OFFICE, Bronx, NY, Employer)	
)	

Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 26, 2020 appellant, through counsel, filed a timely appeal from a January 9, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 9, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 9, 2020.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 6, 2016 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 2016 she experienced pain in her lower back, hips, and thighs when standing in the lobby assisting customers while in the performance of duty. She explained that she was assisting customers to pack their boxes and complete forms needed for shipping or mailing. Appellant stopped work on November 27, 2016 and has not returned. On the reverse side of the claim form, the employing establishment indicated that she was not injured in the performance of duty, noting that there was no way she could have injured her back while assisting a customer.

By decision dated January 25, 2017, OWCP denied appellant's traumatic injury claim. It found that she had not submitted rationalized medical evidence establishing causal relationship between her diagnosed back conditions and the accepted employment incident.

On February 22, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated August 11, 2017, OWCP's hearing representative affirmed the January 25, 2017 decision. She noted that the newly submitted evidence did not sufficiently explain how the November 26, 2016 work incident caused an injury or what effect it had on appellant's preexisting back condition.

On July 31, 2018 appellant, through counsel, requested reconsideration.

By decision dated October 26, 2018, OWCP denied modification of its August 11, 2017 decision. It found that the newly submitted medical evidence failed to differentiate between the effects of standing and walking in the lobby and appellant's preexisting conditions. Therefore, the medical evidence failed to support that the diagnosed medical conditions were caused or aggravated by the work-related event of standing and walking in the lobby.

Following OWCP's October 26, 2018 decision, OWCP received progress reports from Dr. John Mitamura, a Board-certified orthopedic surgeon, dated October 10, November 7, and December 13, 2018 and January 23, February 26, and March 28, 2019. Dr. Mitamura diagnosed lumbar spine instability with radiculopathy and opined that appellant was totally disabled from work. Additional treatment modalities were also requested.

⁴ Docket No. 19-0322 (issued July 18, 2019).

On November 26, 2018 appellant filed a timely appeal to the Board. By decision dated July 18, 2019,⁵ the Board set aside OWCP's October 26, 2018 decision and remanded the case for further development. The Board found that, while Dr. Mitamura's reports were not completely rationalized and were insufficient to meet appellant's burden of proof to establish her claim, they were consistent in indicating that she sustained a back injury on November 26, 2018 while assisting a customer in a standing position and raised an uncontroverted inference between her diagnosed back conditions and the work-related incident. The Board concluded that the evidence of record was sufficient to require OWCP to further develop the medical evidence.

Following the Board's decision, appellant submitted electromyogram and nerve conduction velocity (EMG/NCV) studies dated September 15, 2005, November 24, 2014, and March 21, 2016. The 2005 study was consistent with L5-S1 radiculopathy on the right side. The 2014 and 2016 studies documented mild-to-moderate nerve root compromise of the bilateral L5 and S1 nerve roots with spondylolysis at L4-5.

On August 7, 2019 OWCP prepared a statement of accepted facts (SOAF) and referred appellant, along with a series of questions and the case record, to Dr. Sean Lager, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a September 18, 2019 report, Dr. Lager noted that appellant had both prior work and nonwork-related injuries. Based on her prior back injuries, appellant sustained a temporary aggravation to a preexisting lumbar condition. Based on his examination, Dr. Lager found that the aggravation had ceased as his objective findings and subjective complaints did not correlate to a lumbar issue. Rather, appellant appeared to be disabled due to nonwork-related medical conditions. Dr. Lager opined that she could return to work in a light-duty capacity with a 10-to 20-pound lifting restriction as she had disc herniation with spondylosis and limited motion and strength on examination. He also opined that no further medical treatment was indicated. In his October 18, 2019 Form OWCP-5c, Dr. Lager diagnosed disc herniation with spondylosis and opined that appellant was restricted to pushing, pulling, and lifting no more than 20 pounds for two hours and that the restrictions would apply for five months.

On November 6, 2019 OWCP requested clarification of Dr. Lager's report regarding his answers to OWCP's posed questions. In a November 27, 2019 addendum, Dr. Lager indicated that appellant's prior injuries accounted for her current condition. He noted that the December 15, 2005 magnetic resonance imaging (MRI) scan report of the lumbar spine showed a protruded disc herniation posteriorly at the L5-S1 level, which preexisted the November 26, 2016 work injury, which was a temporary aggravation and which had resolved. Dr. Lager advised that appellant was disabled due to her prior reported conditions based on the medical evidence provided. Proposed medical treatment was not medically necessary as it related to the November 26, 2016 work incident. Dr. Lager opined that, since the temporary aggravation had resolved, appellant could return to a modified city carrier job with lifting restrictions of 20 pounds and frequent sitting breaks.

By decision dated January 9, 2020, OWCP accepted appellant's claim for temporary aggravation of lumbar herniated disc at L5-S1, resolved as of September 18, 2019. The weight of the medical evidence was accorded to Dr. Lager's September 18 and November 27, 2019 reports that the accepted work incident of November 26, 2016 caused a temporary aggravation of her

⁵ *Id.*

preexisting lumbar herniation at L5-S1, resolved by the date of his September 18, 2019 examination. It terminated wage-loss compensation and medical benefits for the temporary aggravation of lumbar herniated disc at L5-S1 effective January 9, 2020.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.⁶ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment injury.⁷ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁹ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.¹⁰

The Federal (FECA) Procedure Manual provides that the findings of an OWCP referral physician or impartial medical specialist must be based on the factual underpinnings of the claim, as set forth in the SOAF.¹¹ When OWCP's referral physician or impartial medical specialist does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished or negated altogether.¹²

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 9, 2020.

Preliminarily, the Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's October 26, 2018 decision because the Board

⁶ *S.P.*, Docket No. 19-0196 (issued June 24, 2020); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ See *S.P.*, *id.*; *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁸ *D.G.*, *supra* note 6; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ *S.P.*, *supra* note 6; *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

¹⁰ *D.G.*, *supra* note 6; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.1 (September 2009).

¹² *Id.* at Chapter 3.600.3(10) (October 1990).

considered that evidence in its July 18, 2019 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³

Following the Board's remand decision, OWCP accepted temporary aggravation of lumbar herniated disc at L5-S1, resolved as of September 18, 2019, based on Dr. Lager's September 18 and November 27, 2019 reports and terminated appellant's wage-loss compensation and medical benefits, effective January 9, 2020.

In his September 18 and November 27, 2019 reports, second opinion physician Dr. Lager opined that appellant was disabled from work due to nonwork-related medical conditions. In finding that the temporary aggravation of lumbar herniated disc at L5-S1 had resolved as of September 18, 2019, he indicated that she had a preexisting disc herniation with spondylosis and that there was limited motion and strength on examination. Dr. Lager then provided temporary lifting restrictions for the disc herniation with spondylosis. He opined that appellant's objective findings and subjective complaints did not correlate to a lumbar issue and no further medical treatment was indicated.

The Board finds that Dr. Lager's opinion is not sufficiently rationalized to carry the weight of the medical evidence.¹⁴ Dr. Lager's opinion does not provide a rationalized medical explanation, based on objective medical evidence, that appellant's temporary aggravation of lumbar herniated disc at L5-S1 had resolved as of September 18, 2019. He provided no specific discussion explaining findings to substantiate his conclusion that her preexisting back condition had resolved to baseline such that the objective findings noted and temporary restrictions provided were solely related to the preexisting lumbar herniated disc at L5-S1 and not to the accepted temporary aggravation of her preexisting lumbar spine condition. This lack of rationale casts doubt on Dr. Lager's understanding of the facts of appellant's claim.¹⁵ His opinion that appellant could return to modified work with temporary restrictions due to a nonwork-related lumbar condition was conclusory without sufficient medical rationale to support his findings.¹⁶ Furthermore, given Dr. Lager's failure to discuss the accepted November 26, 2016 work incident, his opinion is, therefore, of diminished probative value regarding OWCP's termination of appellant's medical benefits.¹⁷

The Board, therefore, finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 9, 2020.

¹³ See *J.G.*, Docket No. 19-0937 (issued October 2, 2019); see *B.B.*, Docket No. 17-0294 (issued May 11, 2018).

¹⁴ See *G.Y.*, Docket No. 19-1683 (issued March 16, 2021); *M.R.*, Docket No. 17-0634 (issued July 24, 2018).

¹⁵ *S.R.*, Docket No. 19-1229 (issued May 15, 2020).

¹⁶ *Id.*

¹⁷ *P.E.*, Docket No. 19-0837 (issued October 20, 2020).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 9, 2020.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 15, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board